IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 32440

STATE OF IDAHO,	)	**2008 Unpublished Opinion No. 621**
	)	
Plaintiff-Respondent,	)	**Filed: August 27, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
KENNETH D. RAWLEY,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the First Judicial District, State of Idaho, Bonner County. Hon. Steven C. Verby, District Judge.

Judgment of conviction and unified sentence of fifteen years, with a minimum period of confinement of twelve years, affirmed.

Molly J. Huskey, State Appellate Public Defender; Heather M. Carlson, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Daniel W. Bower, Deputy Attorney General, Boise, for respondent.

PERRY, Judge

Kenneth D. Rawley appeals from his judgment of conviction and sentence for aggravated battery. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

Early in the morning on New Year's Day, a fight broke out in a bar in Northern Idaho. The fight resulted in the victim being stabbed in the neck with a sharp object. The stab wound required the victim to be flown to Spokane for several hours of emergency surgery. Based on the incidents surrounding the fight, Rawley was charged with three counts of misdemeanor battery for punching three individuals and one count of aggravated battery for stabbing the victim. Rawley pled not guilty and the case proceeded to trial.

Shortly before Rawley's trial, a retired Emergency Medical Technician (the EMT) was disclosed to be called as a witness by the state. On the second day of Rawley's trial, the EMT

arrived and spoke to the prosecutor in the hall. After discussing the matter, the EMT did not testify at that time and was told by the prosecutor that her testimony was no longer needed. Rawley's counsel then spoke with the EMT, and she subsequently testified on Rawley's behalf. The EMT testified that, as she went to render aid to the victim, she bumped into a man who had tattoos on his arms and face, had blood on his hands and face, and was carrying what looked like it could have been a knife. Despite the similarities between the man the EMT described and Rawley, the EMT testified that the man she bumped into was not Rawley. Several other witnesses testified that Rawley provoked the fight inside the bar, that Rawley was the only individual involved in the fight with the victim the evening in question, and that Rawley punched the victim in the jaw seconds before the victim's stab wound in his neck was discovered.

A jury found Rawley guilty of all counts, including the aggravated battery charge at issue in this appeal. I.C. §§ 18-903, 18-907. The district court entered a judgment of conviction and sentenced Rawley to a unified term of fifteen years, with a twelve-year minimum period of confinement. Rawley appeals, challenging the denial of his motion for a mistrial, asserting claims of prosecutorial misconduct, contending the cumulative errors deprived him of due process, and challenging the excessiveness of his sentence.[1]

II.
ANALYSIS

A. Motion for Mistrial

Rawley asserts that the district court abused its discretion when it denied his motion for a mistrial after a state witness testified that Rawley was on federal probation. The state contends that, when viewed in the context of the entire proceeding and given the district court's curative instruction to the jury, Rawley has failed to establish a basis for reversal.

In criminal cases, motions for mistrial are governed by I.C.R. 29.1. A "mistrial may be declared upon motion of the defendant, when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the defendant and deprives the defendant of a fair trial." I.C.R. 29.1(a). Our standard for reviewing a district court's denial of a motion for mistrial is well established:

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[1] On appeal, Rawley does not challenge his judgment of conviction or sentences for the three misdemeanor counts of battery.

> [T]he question on appeal is not whether the trial judge reasonably exercised his discretion in light of circumstances existing when the mistrial motion was made. Rather, the question must be whether the event which precipitated the motion for mistrial represented reversible error when viewed in the context of the full record. Thus, where a motion for mistrial has been denied in a criminal case, the "abuse of discretion" standard is a misnomer. The standard, more accurately stated, is one of reversible error. Our focus is upon the continuing impact on the trial of the incident that triggered the mistrial motion. The trial judge's refusal to declare a mistrial will be disturbed only if that incident, viewed retrospectively, constituted reversible error.

State v. Urquhart, 105 Idaho 92, 95, 665 P.3d 1102, 1105 (Ct. App. 1983).

In this case, during the officer's testimony on direct examination, the following exchange occurred:

> Q. And did [Rawley] acknowledge whether he had or had not been involved in some altercations while he was [at the bar]?
>
> A. Yes. He said he--he actually grabbed a piece of paper and drew a diagram of the [bar] for me. He said, "I like to keep it simple, stupid," and proceeded to tell me that he was on federal probation, that--

At this point in the officer's testimony Rawley objected. The jury was excused and a lengthy discussion took place during which the district court admonished the officer not to testify to anything regarding Rawley's past criminal behavior. When the jury was returned to the courtroom, the district court gave a curative instruction that "at this point I'm going to instruct you you are not to consider the witness's last statement for any purpose. It's not--you are not to consider it in any form in your deliberations."

The following day, Rawley moved for a mistrial pursuant to I.C.R. 29.1. Rawley argued two issues mandated a mistrial: the state's attempt to send the EMT home without testifying and the officer's testimony that Rawley was on federal probation. The district court concluded that the effect of any prosecutorial misconduct that was created by the state's attempt to send the EMT home without testifying was nonexistent because Rawley called the EMT and she testified on his behalf. We agree with the district court's conclusion regarding Rawley's first argument for a mistrial. The EMT was willing to testify that she saw someone with a knife-like object in his hand, covered in blood, shortly after the stabbing, and that the man she saw was not Rawley. The testimony the EMT was willing to provide is exculpatory evidence that the prosecutor had a duty to inform defense counsel of. *See, e.g., Roeder v. State*, 144 Idaho 415, 418, 162 P.3d 794,

797 (Ct. App. 2007) (noting that a constitutional violation is found if undisclosed evidence favorable to the accused was suppressed by the state, either willfully or inadvertently, and prejudice ensued). However, any prejudice created by the improper conduct of the prosecutor in releasing the EMT as a witness without informing defense counsel of the exculpatory nature of her testimony was cured by defense counsel's discovery of the EMT and his being able to call her as a witness. Therefore, we conclude that the prosecutor's misconduct regarding the EMT's testimony does not contribute to Rawley's argument regarding his motion for a mistrial.

With regard to the officer's testimony, the district court reserved ruling on the motion for a mistrial until the end of the trial. At the end of the trial the district court denied Rawley's motion for a mistrial. The district court determined that the officer's testimony involved a single statement that Rawley was on federal probation, and the jury was promptly given a curative instruction to disregard the testimony. The district court also noted that the jury had been given an instruction prior to trial not to consider evidence it would be told to disregard and that it received another instruction before deliberation began.

A prosecutor's statement that the defendant had been in jail, followed by a curative instruction, has been held not to be grounds for a mistrial. *State v. Hill*, 140 Idaho 625, 630-31, 97 P.3d 1014, 1019-20 (Ct. App. 2004). In *Hill*, the prosecutor asked a detective, "'What was the date you spoke to Ms. [Hill] in jail?'" Hill objected and moved for a mistrial. The district court denied the motion for a mistrial, but it instructed the jury that any matters stricken should not be considered or discussed during jury deliberations. On appeal, this Court concluded that the district court did not err in denying Hill's motion for a mistrial. *Id.* at 631, 97 P.3d at 1020. We relied on a United States Supreme Court decision that proclaimed:

> We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an "overwhelming probability" that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be "devastating" to the defendant.

Greer v. Miller, 483 U.S. 756, 766 n.8 (1987) (citations omitted).

In this case, immediately following the officer's improper testimony that Rawley admitted to being on federal probation the district court instructed the jury to disregard the officer's statement. Furthermore, the district court instructed the jury both before and after trial that it was not to consider evidence it had been told to disregard. Given the totality of the

evidence proving Rawley's guilt, the instructions to the jury and our presumption regarding those instructions, we conclude that, viewed retrospectively in light of the entire trial, the district court's refusal to declare a mistrial was not reversible error.

B. Prosecutorial Misconduct

Rawley asserts various claims of prosecutorial misconduct. Some of the alleged incidents of prosecutorial misconduct were objected to below, while others were not. We will address them accordingly. The majority of Rawley's allegations of prosecutorial misconduct occurred during the state's closing argument.

Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007). Its purpose is to enlighten the jury and to help the jurors remember and interpret the evidence. *Id.*; *State v. Reynolds*, 120 Idaho 445, 450, 816 P.2d 1002, 1007 (Ct. App. 1991). Both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom. *State v. Sheahan*, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003); *Phillips*, 144 Idaho at 86, 156 P.3d at 587.

Closing argument should not include counsel's personal opinions and beliefs about the credibility of a witness or the guilt or innocence of the accused. *Phillips*, 144 Idaho at 86, 156 P.3d at 587. *See also State v. Garcia*, 100 Idaho 108, 110-11, 594 P.2d 146, 148-49 (1979); *State v. Priest*, 128 Idaho 6, 14, 909 P.2d 624, 632 (Ct. App. 1995); *State v. Ames*, 109 Idaho 373, 376, 707 P.2d 484, 487 (Ct. App. 1985). A prosecuting attorney may express an opinion in argument as to the truth or falsity of testimony or the guilt of the defendant when such opinion is based upon the evidence, but the prosecutor should exercise caution to avoid interjecting his or her personal belief and should explicitly state that the opinion is based solely on inferences from evidence presented at trial. *Phillips*, 144 Idaho at 86 n.1, 156 P.3d at 587 n.1. The safer course is for a prosecutor to avoid the statement of opinion, as well as the disfavored phrases "I think" and "I believe" altogether. *Id.*

Appeals to emotion, passion or prejudice of the jury through use of inflammatory tactics are impermissible. *Phillips*, 144 Idaho at 87, 156 P.3d at 588. *See also State v. Raudebaugh*, 124 Idaho 758, 769, 864 P.2d 596, 607 (1993); *State v. Pecor*, 132 Idaho 359, 367, 972 P.2d 737, 745 (Ct. App. 1998). The prosecutor's closing argument should not include disparaging

comments about opposing counsel. *Phillips*, 144 Idaho at 86, 156 P.3d at 587. *See also Sheahan*, 139 Idaho at 280, 77 P.3d at 969; *State v. Brown*, 131 Idaho 61, 69, 951 P.2d 1288, 1296 (Ct. App. 1998); *State v. Baruth*, 107 Idaho 651, 657, 691 P.2d 1266, 1272 (Ct. App. 1984).

1. Prosecutorial misconduct with an objection

Although our system of criminal justice is adversarial in nature, and the prosecutor is expected to be diligent and leave no stone unturned, he is nevertheless expected and required to be fair. *State v. Field*, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007). However, in reviewing allegations of prosecutorial misconduct we must keep in mind the realities of trial. *Id.* A fair trial is not necessarily a perfect trial. *Id.* When there has been a contemporaneous objection we determine factually if there was prosecutorial misconduct, then we determine whether the error was harmless. *Id.; State v. Hodges*, 105 Idaho 588, 592, 671 P.2d 1051, 1055 (1983); *Phillips*, 144 Idaho at 88, 156 P.3d at 589. A conviction will not be set aside for small errors or defects that have little, if any, likelihood of having changed the results of the trial. *Pecor*, 132 Idaho at 367-68, 972 P.2d at 745-46. Where prosecutorial misconduct is shown, the test for harmless error is whether the appellate court can conclude, beyond a reasonable doubt, that the result of the trial would not have been different absent the misconduct. *Id.* at 368, 972 P.2d at 746.

a. impeachment evidence

Rawley argues that the state committed prosecutorial misconduct when it read a portion of a preliminary hearing transcript, which had been used earlier for impeachment purposes, into the record during closing argument. The state asserts that the prosecutor did not argue the preliminary hearing testimony as substantive evidence but, rather, used it for the permissible purpose of calling into doubt the credibility of the witness.

Prosecutorial misconduct occurs when the prosecutor argues as substantive evidence of guilt evidence that is admitted solely for impeachment purposes, and the evidence would have been inadmissible for any other purpose. *See State v. Hairston*, 133 Idaho 496, 507, 988 P.2d 1170, 1181 (1999). *See also State v. Clinkenbeard*, 123 P.3d 872, 881 (Wash. Ct. App. 2005) (noting that, because impeachment evidence cannot be used as substantive proof of guilt, the state may not use impeachment as a guise for submitting to the jury substantive evidence that would otherwise be inadmissible). In *Hairston*, the prosecutor argued at trial that it should be allowed to introduce a tape-recorded conversation for the purpose of impeaching a witness. The trial court agreed, but explicitly ordered that the tape was for impeachment purposes only.

However, despite the admonition, the prosecutor argued the contents of the tape during closing argument as substantive evidence of the defendant's guilt. The Supreme Court concluded that, while the prosecutor's argument was clearly improper, it did not rise to the level of fundamental error. *Hairston*, 133 Idaho at 508, 988 P.2d at 1182.

In this case, at trial a witness testified that the victim's wife grabbed Rawley in the face and then Rawley punched her. During re-direct examination, the state used the witness's preliminary hearing testimony to impeach her trial testimony. Specifically, during the preliminary hearing the witness had testified that Rawley first punched the victim's wife and then she grabbed Rawley's face. During closing argument the state asserted:

> Now, there is one person in this entire case who says that [the victim's wife] did something toward Mr. Rawley before he punches her in the face. That person was [the witness]. [The witness] gave you a rendition of how this all happened and up to a certain point everything she says is consistent with all of the other witnesses. Mr. Rawley's behavior. Mr. Rawley coming over and confronting them and going away. Mr. Rawley coming back and interjecting himself and then this tussle and shouting starts. Before you, when she testified yesterday, she said that [the victim's wife] had reached out and taken ahold of Mr. Rawley's face at which time he popped her. Again, *weigh her credibility.*
>
> This is one of the few times that we actually can get a quote from a witness's prior sworn statement because we have a transcript. And you probably got sick of us reading transcripts. And one of the things in that transcript is, of course, [the witness's] testimony under oath on the 23rd day of January--or February, a month or so after this incident, in which she gives the rendition of what happens.
>
> [DEFENSE COUNSEL]: Your Honor, I'm going to object to a reading of impeachment evidence which is not substantive evidence.
>
> THE COURT: Overruled. This is argument.
>
> [THE STATE]: Thank you, Your Honor. And there's questions that I had posed to her at the preliminary hearing and she told you that. And the question was: "What was Mr. Rawley doing?" She goes through that and says, "I don't remember [the victim's wife's] exact words but I remember [Rawley's]. He looked at her and said 'Bitch, you better treat me with some respect.'"
>
> My question to her was: "Was this Mr. Rawley talking to [the victim's wife]?" She says "Yes." "Did you see Mr. Rawley strike someone or hit them?" And this is the answer: "Right after he said that, he hit [the victim's wife]." *That's her testimony. That's her prior testimony*. I said: "With his hand? Where?" She says, "In the face." "Was she standing up or sitting down?" [The witness] says "Standing up." "So he hit her in the face with his hand." And she says "Yes." "What happened next?" *Then listen to this answer she gave.* "Well, everybody is pulling on [Rawley], backing him up and trying to get him outside. But before that could happen, before they could get him outside, [the victim's

> wife] grabbed ahold of his face and then [the victim] jumped in to the incident." That's what happened out there.

(Emphasis added).

Rawley asserts that the prosecutor's final sentence demonstrates that the prosecutor used the preliminary hearing transcript as evidence of substantive guilt. Even if Rawley is correct in his assertion that the prosecutor used the preliminary hearing transcript as evidence of substantive guilt, Rawley has failed to show reversible error. Unlike the recorded conversation in *Hairston* that was not admissible on any grounds other than for impeachment purposes, the preliminary hearing testimony in this case may have been admissible over a hearsay objection as substantive evidence of a prior inconsistent statement by a witness. *See* I.R.E. 801(d)(1)(A); D. CRAIG LEWIS, IDAHO TRIAL HANDBOOK, § 18:5 (2005). Accordingly, we decline to conclude that the prosecutor committed misconduct by reading a portion of the preliminary hearing transcript during closing argument.

b. identification testimony

Rawley argues that the prosecutor committed misconduct when he misrepresented the EMT's testimony and expressed an opinion regarding her credibility. The state counters that the prosecutor did not misrepresent the EMT's testimony and, instead, argued a reasonable inference based on her testimony.

A closing argument may not misrepresent or mischaracterize the evidence. *Phillips*, 144 Idaho at 86, 156 P.3d at 587; *Raudebaugh*, 124 Idaho at 769, 864 P.2d at 607. Furthermore, a prosecutor should avoid expressing personal belief as to the credibility of a witness unless the comment is based solely on inferences from the evidence presented at trial. *State v. Kuhn*, 139 Idaho 710, 715, 85 P.3d 1109, 1114 (Ct. App. 2003). However, both sides have traditionally been afforded considerable latitude in closing argument and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom. *Sheahan*, 139 Idaho at 280, 77 P.3d at 969; *Phillips*, 144 Idaho at 86, 156 P.3d at 587.

In this case, the EMT testified at trial that, on her way to render aid to the victim, she bumped into a man leaving the scene. The EMT testified that the man had blood on his face and hands and was holding an object that could have been a knife. The EMT described the man as having tattoos on his arms coming down to his wrists and a tattoo on his cheek. During direct examination, the EMT testified that the man she bumped into "had light hair or no hair."

However, on cross-examination the EMT testified that she did not "remember seeing his hair for sure." The EMT testified unconditionally that the man she bumped into was not Rawley.

During the state's closing argument the prosecutor asserted:

> A couple of things you're no doubt going to hear about, of course, are [the EMT]. [The EMT] comes in and testifies. She goes through what all happened that night and she says "That's not the guy I bumped into. He doesn't look like the guy I bumped into at all." Except she gives you an exact description of him.
>
> [DEFENSE COUNSEL]: Objection, Your Honor. That is a gross mischaracterization of the evidence.
>
> THE COURT: Well, [the prosecutor] wasn't able to finish his sentence. I am not going to comment on the facts. This is argument. I'm going to overrule the objection at this point.
>
> [THE STATE]: She says there's this man who has lightish colored hair, comes around and bumps into her. And there's two or three things she really notices. One, while she's here he's got something in his hand and she thinks it might be a knife. She's giving you a description that he may have a knife. What kind of knife this is, all of that, I don't know. But he may have a knife in his hand. He may have some instrument in his hand. And she said it could be a key chain. It could be, as I think she told me, any kind of metallic looking object. But she also says he's got tattoos and tattoos (indicating)--
>
> [DEFENSE COUNSEL]: Your Honor, I have to object. This is such a gross mischaracterization of the evidence. Everybody knows that.
>
> THE COURT: The jurors are going to be deciding the facts in this case. I will not comment on the evidence.
>
> [THE STATE]: It's the State's belief that the man she ran into probably was Ken Rawley.
>
> [DEFENSE COUNSEL]: Your Honor, I have to object to that. Her testimony was unequivocal "This man is not the man I bumped into." They can't argue facts not in evidence.
>
> THE COURT: Again, these are issues of fact for the jury to determine. I am not going to comment on the evidence.

On appeal, Rawley concedes that the state could point out the similarities in placement of tattoos and imply that maybe the EMT was mistaken about who she saw. However, Rawley argues that the state "could not represent that she in fact saw Mr. Rawley when she explicitly stated that was not him," and that the prosecutor committed misconduct by expressing his opinion regarding the EMT's credibility. We disagree with Rawley's characterization of the state's closing argument.

The state began by acknowledging that the EMT had testified that the man she bumped into was not Rawley. Then, after recounting the EMT's description of the man in order to highlight the similarities with Rawley's appearance, the state argued a permissible inference,

based on the EMT's description, that the man she saw was "probably" Rawley. The state did not characterize the EMT as testifying that the man she bumped into was Rawley.

Furthermore, the state's comments were based solely on the inferences from the evidence presented at trial. The state was attempting to demonstrate to the jury that the EMT's testimony was internally inconsistent. The EMT gave a general description of Rawley when describing the man she bumped into. All of the witnesses testified that only Rawley was involved in the fight with the victim. However, the EMT concluded that the man she bumped into was not Rawley. The state's attack on the accuracy of the witness's testimony--that her conclusion that the man was not Rawley was incorrect--was based solely on inferences from the evidence presented at trial. Therefore, we conclude that, based in part on the considerable latitude afforded the parties during closing argument, the state did not commit misconduct in its characterization of the EMT's testimony.

c. comparison to the Scott Peterson case

Rawley argues that the state committed misconduct when, during closing argument, the prosecutor compared Rawley's case to the Scott Peterson case, an out-of-state, high-profile murder case that received national media attention. The state responds that the prosecutor's references to the Peterson case were not improper and, alternatively, any error was cured by the district court's instruction to the jury to disregard the state's argument.

During the state's closing argument the following exchange occurred:

> [THE STATE]: If these arguments of [defense counsel] don't rise to the phantom killer, nothing does. If this isn't this nebulous stabber, the phantom stabber, if that's not what he's arguing to you, then I would expect soon to see posters up that say "Let's go join Scott Peterson in his quest to find Lacey and the baby's killer."
>
> [DEFENSE COUNSEL]: Your Honor, that's absolutely improper argument. I object to that.
>
> THE COURT: Objection overruled.
>
> [THE STATE]: What we have in that case and I only use it because of the characterizations, you have circumstantial evidence which a jury found beyond a reasonable doubt--
>
> [DEFENSE COUNSEL]: Judge, this is improper argument. I have to object. He can't be comparing the Lacey Peterson case or Scott Peterson case to this case. That's outrageous. And to suggest that because Scott Peterson was found guilty, they ought to find him guilty, that is outrageous.

At this point during the closing argument, the jury was excused. After listening to arguments by both defense counsel and the state, the district court sustained Rawley's objection because the state was attempting to argue the case based on facts not before the jury. The jury was returned to the courtroom, and the district court gave the following admonishment at Rawley's request:

> THE COURT: Please be seated. Ladies and gentlemen of the jury, again I instruct you you are to decide this case based solely upon the evidence that has been submitted in this case. This is not a case where we use information that has been related to us by the news media from some other case as a comparison. You are to decide this case solely upon the evidence and the evidence that you are allowed to consider as I have instructed you.

Closing argument may not refer to facts not in evidence nor appeal to emotion, passion, or prejudice of the jury through inflammatory tactics. *Phillips*, 144 Idaho at 86-87, 156 P.3d at 587-88. Several jurisdictions have found misconduct where the state compares a defendant or the defendant's case to a high-profile case. *See DeFreitas v. State*, 701 So. 2d 593, 601 (Fla. Dist. Ct. App. 1997) (concluding prosecutor's reference to O. J. Simpson during closing argument was misconduct that, standing alone, may not have risen to the level of fundamental error, but concluding the reference contributed to the cumulative error doctrine); *State v. Thompson*, 578 N.W.2d 734, 743 (Minn. 1998) (comparing defendant to O. J. Simpson was prosecutorial misconduct, but concluding the error was harmless); *State v. Troy*, 688 P.2d 483, 486 (Utah 1984) (concluding that a reference to John Hinkley--the man who attempted to assassinate President Reagan--during closing argument was prosecutorial misconduct because it called the jury's attention to matters outside the evidence and may have prejudiced the jury).

We conclude that the prosecutor's reference to the high-profile murder case of Scott Peterson and the prosecutor's attempt to compare the facts in that case to the facts in Rawley's case was improper and constituted prosecutorial misconduct. However, we note that the references and comparisons to the Peterson case were brief and that the district court gave the jury a curative instruction to disregard information from the news media. The district court also admonished the jury not to rely on other cases for comparison and to decide Rawley's case solely on the evidence presented. We presume that the jury followed the district court's instructions. *See State v. Kilby*, 130 Idaho 747, 751, 947 P.2d 420, 424 (Ct. App. 1997); *State v. Hudson*, 129 Idaho 478, 481, 927 P.2d 451, 454 (Ct. App. 1996). Therefore, although we do not condone the

prosecutor's improper argument, we conclude that any prejudicial effect from those comments was cured by the district court's clear and contemporaneous instruction to the jury to disregard that argument.

2. Prosecutorial misconduct absent an objection

When there is no contemporaneous objection a conviction will be reversed for prosecutorial misconduct only if the conduct is sufficiently egregious so as to result in fundamental error. *Field*, 144 Idaho at 571, 165 P.3d at 285. Prosecutorial misconduct rises to the level of fundamental error when it is calculated to inflame the minds of jurors and arouse prejudice or passion against the defendant or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence. *Kuhn*, 139 Idaho at 715, 85 P.3d at 1114. Prosecutorial misconduct rises to the level of fundamental error only if the acts or comments constituting the misconduct are so egregious or inflammatory that any ensuing prejudice could not have been remedied by a curative jury instruction. *Id*. The rationale of this rule is that even a timely objection to such inflammatory statements would not have cured the inherent prejudice. *Id*. However, even when prosecutorial misconduct has resulted in fundamental error, the conviction will not be reversed when that error is harmless. *Field*, 144 Idaho at 571, 165 P.3d at 285. The test for whether prosecutorial misconduct constitutes harmless error is whether the appellate court can conclude, beyond a reasonable doubt, that the result of the trial would not have been different absent the misconduct. *Pecor*, 132 Idaho at 368, 972 P.2d at 746.

When the defendant did not object at trial, our inquiry is, thus, three-tiered. *See Field*, 144 Idaho at 571, 165 P.3d at 285. First, we determine factually if there was prosecutorial misconduct. If there was, we determine whether the misconduct rose to the level of fundamental error. Finally, if we conclude that it did, we then consider whether such misconduct prejudiced the defendant's right to a fair trial or whether it was harmless.

Rawley argues that the state committed misconduct when the prosecutor made several references to the three Cs defense--complain, confuse, and criticize--during its closing argument and rebuttal closing argument. Rawley did not object to these statements by the prosecutor, but he claims they are reviewable as fundamental error. The state counters that the prosecutor's comments critiquing the tactics employed by the defense were not improper, the comments did not rise to the level of fundamental error and, alternatively, any error was harmless.

During closing argument, the prosecutor asserted:

> What you have heard from the defense in this case is what I, at least, and several others often call the three Cs defense. C as in the letter C. Basically, it consists very simply of three parts. One, is complain; two, is confuse; and, three, is criticize. And again I leave it to you to evaluate what went on in this trial. Complaining, attempts at confusion, and hours of criticism. And you're probably gonna hear some more. But let's look at the facts.
>
> . . . .
>
> Coming back to the three Cs defense is we complain about things not done. We criticize the things that weren't done. Did you go search the car? Did you search the house? Didn't you go do this? Maybe they should have done more.
>
> . . . .
>
> Listen to what the facts are. Don't get diverted by the three Cs. Criticize the cops. We criticize the witnesses. We criticize everybody. We scatter stuff in the middle here and we hope you get confused. There's no reason for confusion in this case. There's zero, zero doubt in this case.

During rebuttal closing argument the prosecutor again referenced the three Cs, commenting:

> First of all I'm pleased that the defense did not disappoint me in predicting that they would have the three Cs defense. You got it all and a fourth, I guess.
>
> . . . .
>
> What we have are creative measurements, creative times as the defense presents the three Cs.
>
> . . . .
>
> Ladies and gentlemen, part of the three Cs is I didn't do it. Just a statement. I didn't do it. And if those lousy cops would just go out and hunt and hunt and hunt, they'd find who did.

It is misconduct for a prosecutor to include in his or her argument disparaging comments about opposing counsel. *Sheahan,* 139 Idaho at 280, 77 P.3d at 969; *Phillips,* 144 Idaho at 86, 156 P.3d at 587; *Brown*, 131 Idaho at 69, 951 P.2d at 1296. In this case the prosecutor's comments regarding the three Cs defense did not directly disparage opposing counsel. However, comments similar to the statements made in this case have been held to be prosecutorial misconduct. For example, the statement that "'it's a favorite defense tactic to try to get you to focus on unnecessary facts or to get you emotionally wrapped up with the defendant'" was deemed "clearly improper." *United States v. Boldt,* 929 F.2d 35, 40 (1st Cir. 1991). In *Boldt,* the First Circuit noted that the "institutional nature of the comment" was particularly troubling

because it cast "suspicion not merely on a defense possibly employed by this defendant but on the role of defense counsel in general." *Id.* In this case, the same may be said about the institutional nature of the three Cs comment and its potential effect on the jury's opinion of the role of defense counsel in general.

The prosecutor's remarks in this case are also similar to those at issue in *Sheahan,* where the prosecutor accused defense counsel of trying to hide the facts and to mislead the jury. The Idaho Supreme Court in *Sheahan* held that, although these comments were improper, they did not rise to the level of fundamental error. *Sheahan*, 139 Idaho at 281, 77 P.3d at 970. Similarly, a prosecutor's statement that defense counsel should have been an actor was improper, but not so egregious that any resulting prejudice could not have been avoided by a timely objection and an appropriate curative instruction from the trial court. *Brown*, 131 Idaho at 69, 951 P.2d at 1296. And, a prosecutor's statements that defense counsel had attempted to "deflect [the jury's] attention from the important things," "muddy the waters," and "distract [the jury] from your job" did not rise to the level of fundamental error. *State v. Contreras-Gonzales,* __ Idaho __, __, __ P.3d __, __ (Ct. App. 2008).

In this case, rather than directly disparaging defense counsel, the prosecutor's statements suggest that defense counsel was trying to misdirect the jury by focusing on unimportant matters, such as implying the police investigation could have been more thorough. Although the prosecutor's comments about the three Cs defense were also improper, we conclude that the comments did not rise to the level of fundamental error.

C. Cumulative Error

Rawley asserts that the cumulative effect of the officer's testimony that Rawley was on federal probation combined with the alleged prosecutorial misconduct during closing argument deprived him of a fair trial. The state counters that Rawley has failed to establish more than one error and, therefore, the cumulative error doctrine is inapplicable.

The cumulative error doctrine refers to an accumulation of irregularities, each of which by itself might be harmless, but when aggregated, show the absence of a fair trial in contravention of the defendant's right to due process. *State v. Moore*, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998). The presence of errors alone, however, does not require the reversal of a conviction because, under due process, a defendant is entitled to a fair trial, not an error-free trial. *Id.*

In this case, although the officer's testimony regarding Rawley being on federal probation was clearly improper, we presume the jury was able to follow the district court's instruction and disregard that testimony. Additionally, the prosecutor's attempt to send the EMT home without testifying was clearly improper; however, because Rawley was able to call her as a witness there was no resulting prejudice. We concluded that no prosecutorial misconduct occurred regarding the impeachment evidence or the identification testimony. Although the prosecutor's comparison to the Scott Peterson case was clearly improper, again we presume any prejudice was eliminated by the district court's curative instruction. Finally, the prosecutor's reference to the three Cs defense was not fundamental error, and any resulting prejudice could have been eliminated by a contemporaneous objection and a curative instruction.

The prosecutor certainly could have handled this case differently and in a manner more in tune with his role as an advocate for the truth, justice, and fairness. We do not condone the prosecutor's conduct in this case nor that of the officer who injected inadmissible evidence into the trial. However, given the considerable latitude afforded during closing argument, the curative instructions offered by the district court, and the evidence presented that only Rawley fought with the victim the night in question and that Rawley punched the victim seconds before the victim's severe stab wound was discovered, we cannot conclude that Rawley was denied his right to due process.

D. Sentence Review

Rawley asserts that the district court abused its discretion when it sentenced him to a unified term of fifteen years, with a twelve-year minimum period of confinement, for aggravated battery. Specifically, Rawley contends the district court failed to adequately consider the support of Rawley's friends and his health concerns. The state counters that the district court properly exercised its discretion in assessing the sentencing goals.

An appellate review of a sentence is based on an abuse of discretion standard. *State v. Burdett*, 134 Idaho 271, 276, 1 P.3d 299, 304 (Ct. App. 2000). Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown,* 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). A sentence may represent such an abuse of discretion if it is shown to be unreasonable upon the facts of the case. *State v. Nice*, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982). A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary "to accomplish the primary

objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case." *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). Where an appellant contends that the sentencing court imposed an excessively harsh sentence, we conduct an independent review of the record, having regard for the nature of the offense, the character of the offender, and the protection of the public interest. *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

At the sentencing hearing, the district court stated:

> I have reviewed the Presentence Investigation. I have taken into consideration the nature of the offense, including the punishment range. I've taken into consideration both aggravating and mitigating factors. I take into consideration the impact that this has had on the victim, as he testified in court. I take into consideration the nature of Mr. Rawley, his credibility, his remorse, his attitude. I further take into consideration Idaho Code Section 19-2521.
>
> . . . .
>
> The presentence investigator states that Mr. Rawley has an extensive criminal history with roughly 28 years of his life being incarcerated in both state and federal correctional facilities. He is habitually noncompliant with requirements and restrictions of supervised probation which is shown in the revocation of probation on several occasions. Mr. Rawley looks for loopholes in technicalities to bypass or avoid taking responsibility for his actions.
>
> . . . .
>
> Mr. Rawley, the jury found that you were guilty of aggravated battery. The facts as found by the jury demonstrated a violent and despicable act. The effect that that act had on the victim was severe. I am sentencing you based on that violent and despicable act and based upon the jury's finding that you are guilty of that act.

The district court considered both aggravating and mitigating factors. Additionally, the senseless crime in this case occurred after a pointless dispute in a bar that was initiated by Rawley, and it almost took the victim's life. Therefore, Rawley has not shown that the district court abused its discretion in sentencing him to a unified term of fifteen years, with a twelve-year minimum period of confinement, for aggravated battery.

III.

CONCLUSION

The district court's refusal to order a mistrial was not reversible error. The prosecutor did not commit misconduct when he read a portion of impeachment evidence into the record during

closing argument, nor did he commit misconduct regarding the EMT's identification testimony. The prosecutor did commit misconduct by comparing Rawley's case to the Scott Peterson case. However, we conclude that any prejudicial effect was eviscerated by the district court's curative instruction. The prosecutor also committed misconduct during closing argument by referring to the three Cs defense, but this misconduct did not rise to the level of fundamental error. The cumulative effect of the alleged errors did not deprive Rawley of his right to due process. And the district court did not abuse its discretion in sentencing Rawley to a unified term of fifteen years, with a twelve-year period of minimum confinement, for aggravated battery. Therefore, Rawley's judgment of conviction and sentence are affirmed.

Chief Judge GUTIERREZ and Judge LANSING, **CONCUR.**